Wright Electric, Inc. a*nd* International Brotherhood of Electrical Workers, Local 292, AFL–CIO. Cases 18–CA–12820, 18–CA–13193, and 18–CA–13369

August 9, 2001

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 14, 2001, Administrative Law Judge Jerry M. Hermele issued the attached Supplemental Decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The backpay period at issue in this case began in the second quarter of 1994, when the Respondent unlawfully refused to hire discriminatee Louis J. Lutz, and ended in the second quarter of 2000, when Lutz accepted the Respondent's offer of employment and began work. Lutz was able to find employment for 23 of the 24 calendar quarters of the backpay period. The gross amount of backpay that the judge found the Respondent must pay to Lutz accrued solely during a 7-week period when Lutz was unemployed, which constituted only one-half of one calendar quarter of the entire 24-quarter backpay period. The Respondent asserts that it owes nothing to Lutz, because he failed to make a reasonable effort to secure employment during those 7 weeks in the second quarter of 1994.

In seeking interim employment, a backpay claimant need only follow his regular method for obtaining work. *Ferguson Electric Co*., 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).[2] The "sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period." *Electrical Workers IBEW Local 3 (Fischbach & Moore),* 315 NLRB 1266 (1995), citing *I.T.O. Corp. of Baltimore*, 265 NLRB 1322 (1982). The burden is on the employer to establish that an employee failed to make reasonable efforts to find interim work. Id.

Lutz' usual practice of obtaining work during his 16 years as a union member was through the Union's hiring hall. Lutz registered for work with the Union on March 3, 1994, and re-registered each month thereafter. By following his usual practice, Lutz was able to find employment for the entire, 6-year backpay period starting in May 1994, and ending in June 2000, except for the 7-week period referred to by the Respondent.[3]

The record clearly shows that Lutz did all that a discriminatee is legally required to do in order to mitigate his damages: He diligently (and for the most part successfully, as it turns out) followed his usual method of obtaining work over a 6-year period, including the 7-week period on which the Respondent focuses. The Respondent's showing that Lutz's efforts were unsuccessful during an isolated portion of the backpay period is not sufficient to satisfy its burden of establishing that he failed to diligently seek interim employment during the backpay period as a whole.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wright Electric, Inc., its officers, agents, successors, and assigns, shall pay to Louis J. Lutz the sum of $5132, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.

Timothy B. Kohls, Esq., Minneapolis, Minnesota, for the General Counsel.

Gregg J. Cavanagh, Esq., Maple Grove, Minnesota, for the Respondent.

SUPPLEMENTAL DECISION[1]

I. STATEMENT OF THE CASE

JERRY M. HERMELE, U.S. Administrative Law Judge. On March 31, 1999, the National Labor Relations Board affirmed the November 26, 1996 decision of Administrative Law Judge William J. Pannier III, which found that the Respondent, Wright Electric, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to hire Louis J. Lutz

[1] The Board's underlying decision is reported at 327 NLRB 1194 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000).

At fn. 1 of his decision, the judge observed that upon publication, "unauthorized changes may have been made by the Board's Executive Secretary to the Presiding Judge's original version." It is the Board's established practice to correct any typographical or other formal errors before publication of a decision in the bound volumes of NLRB decisions.

[2] Accord,: *Tualatin Electric*, 331 NLRB 36 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001).

[3] Moreover, Lutz registered for work through the Minnesota Department of Economic Security.

[1] Upon any publication of this Supplemental Decision by the National Labor Relations Board, unauthorized changes may have been made by the Board's Executive Secretary to the Presiding Judge's original version.

for a job because of his union membership.[2] On January 19, 2000, the United States Court of Appeals for the Eighth Circuit enforced the Board's decision ordering the Respondent to offer Lutz a job. Lutz then accepted the offer and started working for the Respondent on June 19, 2000, but a dispute arose over the amount of backpay he was owed as a result of the Respondent's failure to hire him in 1994. Thus, the General Counsel issued a "compliance specification" on September 29, 2000, alleging that the Respondent owed Lutz $5164 in backpay for the second quarter of 1994 (May 9 to June 30) when the Respondent hired someone other than Lutz and Lutz was not working. Other than this brief period, Lutz worked continuously through the present. On October 19, 2000, the Respondent filed an answer, claiming that because Lutz failed to make a reasonable effort to obtain employment in 1994, other than with the Respondent, he is ineligible for any backpay.

So, a trial was held on November 2, 2000 in Minneapolis, Minnesota, during which the General Counsel presented only written evidence and the Respondent called five witnesses. Both parties stipulated that the proper backpay figure for Lutz is $5132 (Joint Ex. 1). Finally, both parties filed briefs on December 6, 2000.

II. FINDINGS OF FACT

Louis Lutz has been a member of the International Brotherhood of Electrical Workers, Local 292, AFL-CIO (the Union) since 1978, and a journeyman electrician since 1981 (Tr. 40-41, 53). In the course of his career, he has relied upon the Union for referrals to jobs, many of which have been short-term in length (Tr. 54-55). For example, from October 1993 to January 1994, the Union referred him to six employers, all of which jobs lasted two weeks or less. The last of these jobs ended on January 28, 1994 (R. Ex. 1).

Lutz employed several methods to obtain work thereafter. First, as required by the Union's rules, he visited the Union office every month to resign the out-of-work list, doing so on March 3, March 28, April 27, May 31, and June 30. Despite hundreds of requests from employers for union journeymen, there were hundreds more names in front of Lutz's. Thus, Lutz received no job offers and was out of work for 5-1/2 months in the first half of 1994—the longest such stretch in his career (Tr. 7-8, 20-25, 35, 37, 45, 56). Second, union organizer Michael Priem asked Lutz if he would be interested in two job possibilities Priem had located in the Minneapolis Star-Tribune. Neither of these advertisements named the employer and Priem suspected they were both nonunion, thus creating a salting opportunity for an out-of-work union member to obtain employment and organize the employees for the Union. Priem asked Lutz if he could send Lutz's resume to these two employers, one of which was the Respondent. Lutz agreed and prepared a resume, which Priem sent to the blind ads on March 17, 1994, along with cover letters identifying Lutz as a union electrician. Lutz never received a response from either employer. But the Respondent hired Peter Abrahamson, who never responded to the newspaper ad, on May 9, 1994 (G.C. Ex. 1(a); R. Ex. 2; Tr. 47, 52, 60-66). Third, in April, Lutz used the state unemployment office to apply for electrician jobs with 3M, General Mills, Northwest Airlines and Ford Motor Company, all of which he assumed were unionized employers. From this group, Lutz obtained two interviews but no job offers (Tr. 49-50, 52, 53). Fourth, he read job advertisements in the Minneapolis Star Tribune and St. Paul Pioneer Press "all the time" he was unemployed but found "very few ads" and applied to none (Tr. 50-51, 58-60).

According to Priem, there were very few available jobs for electricians in early 1994 (Tr. 64). But according to the owners of two nonunion electrical employers in suburban Minneapolis, Cities Electric, Inc. and West Star Electric, they needed journeyman electricians in the first half of 1994. To that end, they ran five newspaper advertisements from January 1994 to June 1994 in the Minneapolis Star Tribune and St. Paul Pioneer Press newspapers, but received few responses. According to Steven Sowieja and Curtis Huelsnitz, Lutz was qualified and would have been considered for jobs with their companies if he applied in 1994. Also according to both men, in view of the scarcity of journeymen electricians then, and the great demand for their skills, especially during the springtime when many jobs were gearing up, Lutz should have found work within a matter of weeks (Tr. 70-76, 81, 86, 87-97). Both of these employers paid $14 to $16 an hour in 1994, compared to the Union's rate of $21.26 (Tr. 77, 95, 98). Including the ads run by Sowieja and Huelsnitz, there were approximately 70 similar ads seeking journeymen electricians in May and June 1994 in the Minneapolis Star Tribune and St. Paul Pioneer Press (R. Ex. 4).

Lutz went on vacation on June 30, 1994, and informed the Union not to refer any jobs to him until July 11 (Tr. 29, 46). Finally, on July 11, the Union referred him to a job at Gephart Electric (R. Ex. 1; Tr. 55). Thereafter, Lutz worked at three other employers through mid-1996, and thereafter at the Hennepin County Medical Center through 2000. Then, following the Court of Appeals' January 2000 decision, the Respondent offered Lutz a position which, for reasons unexplained in the record, he accepted on June 19, 2000.

III. ANALYSIS

It is very well-settled that, in compliance proceedings, the General Counsel has the burden to establish the gross amount of backpay owed to the discriminatee. Then, the burden shifts to the employer, who has committed the illegal unfair labor practice, to produce evidence that would mitigate its liability. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447, 454 (8th Cir. 1963). For example, the employer must show that the discriminatee failed to make reasonable efforts to find new employment which was substantially equivalent to the position he was not hired for and was suitable to his background and experience. *Southern Silk Mills, Inc.,* 116 NLRB 769, 773 (1956). But because the employer has already been adjudged to be a wrongdoer, any doubts should be resolved in favor of the discriminatee, who is the wronged party. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Thus, it is okay that the discriminatee's job search was not successful or failed to exhaust all possible leads; rather, it is enough that, under all the circum-

[2] The Board remanded a portion of Judge Pannier's decision on the matter of the Respondent's state court lawsuit against the Union, directing the Judge to decide the alleged violation of Section 8(a)(1) and (4) when the state court action became final. That action is still pending.

stances, he made a good–faith search. *Pepsi-Cola Bottling Co. of Fayetteville,* 330 NLRB 1043 (2000); *Lundy Packing Co.,* 286 NLRB 141, 142 (1987).

In the instant case, the General Counsel has established the gross amount of backpay owed to Louis Lutz, $5132, all of which accrued during the second quarter of 1994. Thus, the only issue, as advanced by the Respondent, is whether Lutz failed to make a reasonable effort to secure employment from May 9, when the Respondent hired someone other than Lutz for its advertised position, to June 30, the end of the second quarter of 1994.[3] To summarize the evidence on this point, Lutz was out of work from January 28 to July 11, 1994, the longest stretch of unemployment in his 20-year career as a journeyman electrician. So he registered monthly with the Union's hiring hall list for out-of-work members, but this method yielded no jobs. He also registered with the state unemployment office, which yielded two interviews but no offers. Lutz also prepared a resume at the request of union organizer Michael Priem, which Priem forwarded to two anonymous, nonunion job advertisements in the newspaper, one of which turned out to be the Respondent. Also, Lutz read the Minneapolis Star-Tribune and St. Paul Pioneer Press but found "very few ads" and applied to none.

Based on the foregoing, the Presiding Judge concludes that Lutz made a reasonably diligent effort to secure interim employment in 1994. Clearly, the most troubling aspect of Lutz'sjob search during the longest stretch of unemployment in his professional career was his total disregard of 70 newspaper advertisements, by the Respondent's count, in the Minneapolis Star Tribune and St. Paul Pioneer Press in May and June 1994, the vast majority of which specifically sought "journeymen electricians." Lutz acknowledged that he saw these advertisements "all the time" yet ignored them because there were "very few." But the evidence, proffered by the Respondent in its Exhibit 4, clearly shows the opposite. Lutz's lack of action is even more puzzling given his preparation of a resume for Priem, which Priem then used to apply for the position advertised anonymously by the Respondent in the Star Tribune. Further, Lutz's failure to recall at trial any reason for his inaction on the newspaper ads was not particularly candid (Tr. 60).

To be sure, the mere existence of 70 or so job advertisements and Lutz' failure to apply for any of them does not by itself mean that Lutz failed to make a reasonable effort to search for work. *Arthur Young & Co.,* 304 NLRB 178, 179 (1991). But the Respondent produced two witnesses at trial, Steven Sowieja and Curtis Huelsnitz, both local electrical company owners since the 1980s, who ran some of these job advertisements in 1994 and listened to Lutz' testimony. Both witnesses credibly opined that Lutz was qualified for the jobs they advertised and that he would have been seriously considered had he applied. Further, both witnesses agreed that the demand for journeymen electricians in 1994 was high and the supply of qualified applicants was low. Given the familiarity of both employers with the local job market, the Presiding Judge gives significant weight to their testimony. See *Fischback/Lord Electric Co.*, 300 NLRB 474, 477 (1990). Compare *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991) (labor expert's testimony rejected where he did not consider the discriminatee's particular credentials). Hence, it is concluded that Lutz had a "reasonable expectation of success" had he applied at either of these two companies, to say nothing of the other companies' numerous newspaper ads he ignored. Compare *Black Magic Resources*, 317 NLRB 721, 722 (1995) (Respondent failed to produce any evidence of available jobs). Moreover, all of the advertised jobs were apparently located in the Twin Cities area. Also, the General Counsel does not suggest that the Union prevented Lutz from applying for these jobs on his own. Compare *Tualatin Electric,* 331 NLRB 36 (2000) (possibility of subjecting discriminatees to internal union charges by seeking work with nonunion contractors through newspaper advertisements). Further, Lutz did not testify that he rejected this course of action because the pay rates would have been too low. On the contrary, as it turns out, both Sowieja's and Huelsnitz's companies paid $14 to $16 an hour in 1994, compared to the Union's rate of $21–$26, which cannot be said to be "well below" Lutz's pay scale and thus a reason for his inaction. Compare *E & L Plastics Corp.*, 314 NLRB 1056, 1058 (1994). Finally, unlike *Ferguson Electric Co.,* 330 NLRB 514 (2000), there is evidence regarding "the 'universe' of employers" to which Lutz might have applied for work—i.e., the instant newspaper advertisements.

Nevertheless, as noted supra, the Respondent bears the burden to show the unreasonableness of the discriminatee's job search and any doubts should be resolved in favor of the claimant rather than the wrongdoer employer. *United Aircraft Corp.,* supra. In this connection, Lutz followed his regular method of obtaining work by registering with the Union every month. See *Ferguson Electric Co.,* supra. He also prepared a resume, at Priem's request, for use in a salting effort with two nonunion employers, including the Respondent. Compare *NLRB v. Madison Courier, Inc.*, 505 F.2d 391, 404 (D.C. Cir. 1974) (claimant made no individual application for employment in his trade). Further, Lutz sought work with several employers through the State unemployment office, which yielded two job interviews. Thus, despite limiting his job search to unionized employers, except for two nonunion salting targets, the preponderance of the evidence warrants the conclusion that Lutz' efforts to obtain employment from May 9 to June 30, 1994 were reasonable. Therefore, the Respondent owes Lutz $5132 in backpay.

ORDER

Accordingly, IT IS ORDERED[4] that the Respondent, Wright Electric, Inc., its officers, agents, successors, and assigns,

[3] The Respondent initially contended that Lutz may have had interim earnings during this period (Joint Ex. 1). But the evidence at trial clearly indicated that he did not, and the Respondent dropped this defense in its brief.

[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

SHALL PAY $5132 to Louis J. Lutz, together with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), making the appropriate deductions from any tax withholding required by State and Federal laws.